

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2005-57-C - ORDER NO. 2006-531  
OCTOBER 11, 2006

IN RE: Joint Petition for Arbitration on Behalf of	)	ORDER RULING ON
NewSouth Communications, Corp., NuVox	)	ARBITRATION
Communications, Inc., KMC Telecom V,	)	
Inc., KMC Telecom III, LLC and Xspedius	)	
[Affiliates] of an Interconnection Agreement	)	
with BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as Amended	)	

**I. PROCEDURAL BACKGROUND**

This matter comes before the Commission upon a Petition for Arbitration filed by the Joint Petitioners<sup>1</sup> pursuant to Section 252 of the federal Telecommunications Act of 1996. The Joint Petitioners initially filed their Petition for Arbitration (“Initial Petition”) with the Commission on February 11, 2004.<sup>2</sup> BellSouth filed its Response to the Initial Petition on March 8, 2004.<sup>3</sup> On October 6, 2004, the Commission entered an Order

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<sup>1</sup> “Joint Petitioners” refers collectively to Xspedius Communications, LLC (“Xspedius”) and NewSouth Communications Corp. (“NewSouth”), which during the course of this proceeding merged with NuVox Communications, Inc. (“NuVox”), with the surviving entity being NuVox. Originally, KMC Telecom V, Inc. and KMC Telecom III, LLC also were parties to this arbitration proceeding. However, on May 27, 2005, the KMC entities withdrew their petition for arbitration, and the Commission subsequently accepted KMC’s withdrawal with prejudice. (SC Tr. at 12-13). Thus, the KMC entities are no longer parties to this proceeding.

<sup>2</sup> See generally Docket No. 2004-42-C.

<sup>3</sup> *Id.*

granting the Parties' Joint Motion to withdraw the Initial Petition "without prejudice, and under the terms stated in the Joint Motion to Withdraw."<sup>4</sup>

In accordance with that Order, the Joint Petitioners subsequently filed the Petition for Arbitration ("Petition") that is the subject of this proceeding on March 11, 2005. The Petition identified the same 107 unresolved issues (excluding subparts) that had been included in the Initial Petition, as well as certain Supplemental Issues (Items 108-114). The Supplemental Issues addressed *USTA II*<sup>5</sup> and the *Interim Rules Order* issued by the Federal Communications Commission ("FCC") in WC Docket No. 04-313, CC Docket No. 01-338. BellSouth filed its Answer to the Petition on April 5, 2005.

The Evidentiary Hearing in this matter was held on June 1, 2005, and June 13, 2006. BellSouth submitted the pre-filed testimony of Kathy Blake, Scot Ferguson, and Eric Fogle. The Joint Petitioners submitted the pre-filed testimony of Hamilton Russell/Susan Berlin,<sup>6</sup> James Falvey, Marva Johnson, John Fury, Robert Collins, and Jerry Willis. The Office of Regulatory Staff ("ORS") did not present a witness, but counsel for ORS appeared at the hearing and participated in the cross-examination of witnesses presented by the Joint Petitioners and BellSouth.

The Commission gave the Parties the opportunity to submit Post-Hearing Briefs and Proposed Orders by July 26, 2006. The Commission has carefully reviewed these

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<sup>4</sup> Order No. 2004-472-C in Docket No. 2004-42-C. The Order explains that the withdrawal would "allow the parties to incorporate the negotiation of those issues precipitated by *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA IP*"), as well as to continue to negotiate previously identified issues . . . ."

<sup>5</sup> *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

<sup>6</sup> On June 13, 2006, the Commission allowed NuVox witness Susan Berlin to adopt the pre-filed Rebuttal testimony and the hearing room testimony that was originally presented by Hamilton Russell and that was the subject of various pleadings and oral arguments.

submissions, the evidence of record,<sup>7</sup> and the controlling law. The Commission's rulings on the twelve remaining unresolved issues are set forth in this Order.<sup>8</sup>

## II. LEGAL STANDARDS UNDER THE 1996 ACT

Sections 251 and 252 of the 1996 Act encourage negotiations between Parties to reach local interconnection agreements. Section 252(a) of the 1996 Act requires incumbent local exchange carriers ("ILECs") to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2)-(6). As part of the negotiation process, the 1996 Act allows a party to petition a state Commission for arbitration of unresolved issues.<sup>9</sup> The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.<sup>10</sup> The petitioning party must submit along with its petition "all relevant documentation

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<sup>7</sup> By Directive dated May 31, 2005, the Hearing Officer granted – with one exception -- the Parties' joint motion regarding hearing procedure. Accordingly, in addition to the transcript of the June 1, 2005 and June 13, 2006 hearings before the Commission, the record in this proceeding also includes: the hearing transcript (including exhibits) from the Florida and Georgia proceedings; the Parties' responses to Florida Staff Discovery Requests; the Parties' responses to Discovery Requests submitted by the other Party; and the depositions (including exhibits) taken by the Parties and by the Florida Staff.

<sup>8</sup> As a result of various rulings in this docket and continued negotiations by the Parties, only 12 issues remain for the Commission to resolve. On March 11, 2005, the FCC's Final Unbundling Rules in FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("TRRO") became effective. No issues in this arbitration substantively address the TRRO because that decision was not effective until March 2005 – after the time period for identifying issues to be arbitrated in this proceeding closed. Nevertheless, Issues 23, 108, 111, 113 and 114 are similar if not identical to issues that were presented in the Commission's Generic Change of Law Proceeding (Docket No. 2004-316-C) relating to changes of law resulting from the TRO and the TRRO. Consequently, on May 31, 2005, the Hearing Officer granted the Parties' joint request to move these issues to the Generic Change of Law Proceeding for consideration and resolution. Similarly, because the TRRO also rendered moot several arbitration issues relating to the *Interim Rules Order*, the Hearing Officer also found on May 31, 2005 that Issues 109, 110, and 112 were moot and removed them from the arbitration. Also, because they were similar, if not identical, to issues presented in the Generic Change of Law Docket (Docket No. 2004-316-C), the Commission removed Issues 26, 36-38, and 51 from this arbitration for consideration and resolution in that generic docket. (SC Tr. at 11-12). Finally, by letter dated August 10, 2006, counsel for the Joint Petitioners informed this Commission that the Parties had resolved Issue 65. This Order, therefore, does not address the merits of any of these issues.

<sup>9</sup> 47 U.S.C. § 252(b)(2)

<sup>10</sup> See generally, 47 U.S.C. §§ 252(b)(2)(A) and 252(b)(4).

concerning: (1) the unresolved issues; (2) the position of each of the Parties with respect to those issues; and (3) any other issues discussed and resolved by the Parties.”<sup>11</sup> A non-petitioning party to a negotiation under this section may respond to the other party’s petition and provide such additional information as it wishes within 25 days after the Commission receives the petition.<sup>12</sup>

The 1996 Act limits a state commission’s consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.<sup>13</sup> Further, an ILEC can only be required to arbitrate and negotiate issues related to Section 251 of the 1996 Act, and the Commission can only arbitrate non-251 issues to the extent they are required for implementation of the interconnection agreement.<sup>14</sup> Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding, and the Commission’s role is to resolve the parties’ open issues to “meet the requirements of Section 251, including the regulations prescribed by the [FCC].”<sup>15</sup>

## II. DISCUSSION OF REMAINING UNRESOLVED ISSUES

In this section, the Commission discusses its findings and conclusions regarding each of the twelve issues that remain for the Commission to resolve.

### ***Issue 4: What should be the limitation of each Party’s liability in circumstances other than gross negligence or willful misconduct? (Agreement GT&C, Section 10.4.1)***

The Joint Petitioners propose language that would limit each Party’s liability for negligent acts to 7.5 percent of amounts paid or payable at the time the claim arose,

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<sup>11</sup> 47 U.S.C. § 252(b)(2).

<sup>12</sup> 47 U.S.C. § 252(b)(3).

<sup>13</sup> 47 U.S.C. § 252(b)(4).

<sup>14</sup> *Coserve Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5<sup>th</sup> Cir. 2003); *MCI Telecom., Corp. v. BellSouth Telecom., Inc.*, 298 F.3d 1269, 1274 (11<sup>th</sup> Cir. 2002).

<sup>15</sup> 47 U.S.C. § 251(c)(1).

subject to several caveats and conditions. Under this proposed language, as of the end of the three-year term of the agreement, BellSouth's liability to NuVox would be capped at more than \$8 million, while NuVox's liability to BellSouth would be capped at \$2,700.<sup>16</sup> Conversely, BellSouth's proposed language limits each Party's liability for negligent acts to bill credits. For the following reasons, the Commission adopts BellSouth's proposed language on this issue.

Both state and federal courts in South Carolina have ruled that sound public policy supports limiting a telephone company's liability for negligent acts that are related to regulated operations.<sup>17</sup> As these courts have recognized, "[r]easonable utility rates are in part dependent on such limitations."<sup>18</sup> The same reasoning applies in this arbitration proceeding.

The 1996 Act requires BellSouth to negotiate interconnection agreements with the Joint Petitioners in good faith.<sup>19</sup> Moreover, if the Parties do not mutually agree to different rates,<sup>20</sup> the 1996 Act obligates BellSouth to charge the Joint Petitioners cost-based rates for certain interconnection and for network elements that remain subject to the Act's unbundling obligations.<sup>21</sup> The cost-based rates the Commission approved for BellSouth's interconnection or unbundled network elements ("UNEs") in South Carolina do not take into account any costs BellSouth would incur if it suddenly lost its limitation

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<sup>16</sup> FL Tr. at 180; SC Tr. at 400-401.

<sup>17</sup> See *Parnell v. Farmers Telephone Coop.*, 344 S.E.2d 883, 886 (S.C. Ct. App. 1986); *Pilot Industries v. Southern Bell*, 495 F.Supp. 356, 361 (D.S.C. 1979).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., 47 U.S.C. § 251(c).

<sup>20</sup> See 47 U.S.C. § 252(a)(1).

<sup>21</sup> See 47 U.S.C. § 252(d)(1)(A).

of liability for negligent acts.<sup>22</sup> Were these rates to be adjusted to include such costs, they clearly would be higher than the rates that exist today and competitive local exchange carriers (“CLECs”) like the Joint Petitioners would have to pay more for interconnection and for UNEs than they pay today. BellSouth’s proposed language, therefore, allows the Joint Petitioners to pay BellSouth lower rates for certain interconnection and for UNEs than they would pay if BellSouth’s liability were not limited in the manner proposed by BellSouth.

In addition to being consistent with the South Carolina court decisions discussed above, the Commission’s adoption of BellSouth’s proposed language also is consistent with decisions of the FCC’s Wireline Competition Bureau,<sup>23</sup> decisions rendered by at least five other state Commissions that have considered this same issue in companion arbitration dockets,<sup>24</sup> and decisions of at least two state Commissions that have

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<sup>22</sup> FL Tr. at 805-806; SC Tr. at 225.

<sup>23</sup> *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-218, 17 FCC Rcd. 27,039 (Jul. 17, 2002) (“**Virginia Arbitration Order**”) at ¶ 709.

<sup>24</sup> See Florida Commission’s *Final Order Regarding Petition for Arbitration*, Order No. PSC-05-0975-FOF-TP, Docket No. 040130-TP at 8 (Oct. 11, 2005) (“**Florida Order**”) (“Further, we find that BellSouth shall treat the Joint Petitioners in the same manner BellSouth treats its own retail customers. It is undisputed that BellSouth’s liability to its own retail customers is limited to the issuance of bill credits; therefore, it is appropriate for BellSouth’s liability to Joint Petitioners to be similarly limited.”); *Recommendation of the Arbitration Panel of the Mississippi Public Service Commission*, Docket No. 2004-AD-094 at 11 (Dec. 13, 2005) (“**Mississippi Order**”) (concluding that “a party’s liability should be limited to the issuance of bill credits in all circumstances other than gross negligence or willful misconduct.”); Georgia Commission’s *Order on Unresolved Issues* in Docket No. 18409-U (July 6, 2006) (“**Georgia Order**”) at 3-4 (adopting Staff’s recommendation “that the parties’ liability for negligence be limited to bill credits); Kentucky Commission, *Order*, Case No. 2004-00044 at 3 (Sept. 26, 2005) (“**Kentucky Order**”) (finding that “BellSouth’s proposal is reasonable” and that the “Joint Petitioners can provide no rationale for why 7.5 percent of amounts paid is reasonable.”), *Joint Petitioners’ motion for reconsideration denied by Kentucky Commission* (March 14, 2006) (“**Kentucky Recon Order**”); *Recommended Order*, NCUC Docket No. P-772, Sub 8, *et al*, at 11 (Jul. 26, 2005) (“**North Carolina Order**”) (“The Commission finds that BellSouth’s language is more appropriate,” citing the FCC Common Carrier Bureau’s decision in the *Virginia Arbitration Order*); *Order Ruling on Objections and Requiring the Filing of the Composite Agreement* (February 8, 2006) at 6 (“**North Carolina Recon Order**”)(denying Joint Petitioners’ motion for

considered this issue in other contexts.<sup>25</sup>

Further, the Commission finds that BellSouth's proposed language embodies the same standard that applies to BellSouth's retail customers<sup>26</sup> and the same standard that has governed the relationship between BellSouth and the Joint Petitioners for the last eight years.<sup>27</sup> Moreover, the Joint Petitioners acknowledge that limiting liability to the provision of bill credits is "probably the current practice" in the industry.<sup>28</sup> In contrast, the Joint Petitioners are aware of no interconnection agreement that contains language that is identical or similar to what they propose here,<sup>29</sup> and none of the Joint Petitioners have the type of limitation of liability language they are proposing in their tariffs or standard retail contracts with South Carolina customers.<sup>30</sup> Instead, like BellSouth, the Joint Petitioners limit their liability to bill credits.<sup>31</sup>

In support of their proposed language, the Joint Petitioners' rely on limitation of liability provisions that allegedly appear in certain commercial contracts.<sup>32</sup> This docket, however, does not address commercial contracts that are negotiated at arms length.

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reconsideration on Issue 4).

<sup>25</sup> See *Sprint Communications, LP*, Case No. 96-1021-TP-ARB (Ohio P.U.C. Dec. 27, 1996), 1996 WL 773809 at \*31 ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers."); *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB, Kansas Corporation Commission at 102 (Feb. 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).

<sup>26</sup> SC Tr. at 225, 227.

<sup>27</sup> FL Tr. at 182; 943; FL Exhibit 14 at § A2.5.1; BellSouth's GSST at A2.5.1, attached as KKB-2 to Blake's Rebuttal Testimony; SC Tr. at 393.

<sup>28</sup> See Russell Depo. at 82-83; see also FL Tr. at 182.

<sup>29</sup> See Joint Petitioners Supplemental Response to Request for Production No. 6; Russell Depo. at 43.

<sup>30</sup> FL Tr. 182, 184; KMC SC Tariff at § 2.1.4 (A); NuVox SC Tariff at § 2.1.4(B)(C); Xspedius SC Tariff at § 2.1.4(A)(H), collectively attached to Blake's SC Direct Testimony as KKB-1 (revised 5/23/05).

<sup>31</sup> *Id.*

<sup>32</sup> FL Tr. at 188.

Instead, it does address interconnection agreements that BellSouth is required to negotiate and arbitrate pursuant to Section 252 of the 1996 Act. As the Fourth Circuit has explained,

“[w]hen the parties are . . . negotiating [an interconnection agreement], many of their disputes will have been previously resolved by among other things, FCC Rules and interpretations, prior state commission rulings and interpretations, and agreements reached with other CLECs – all of which are a matter of public record. . . . In this light, many so-called ‘negotiated’ provisions [in interconnection agreements] represent nothing more than an attempt to comply with the requirements of the 1996 Act.”<sup>33</sup>

The North Carolina Commission also has found that interconnection agreements are “not to be treated as typical commercial contracts,”<sup>34</sup> and the United States District Court for the Southern District of Mississippi reached the same conclusion in its recent decision overturning the Mississippi Public Service Commission’s interpretation of the *TRRO*:

If the FCC’s Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties’ interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection agreements are “not ... ordinary private contract[s],” and are “not to be construed as ... traditional contract[s] but as ... instrument[s] arising within the context of ongoing federal and state regulation.”<sup>35</sup>

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<sup>33</sup> *AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

<sup>34</sup> See *In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub at 6 (Jan. 20, 2005) (“NewSouth Reconsideration Order”).

<sup>35</sup> See *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Comm’n, et al.*, Civil Action No. 3:05CV173LN at 13 (Apr. 13, 2005) (quoting *E.spire Communications, Inc. v. N.M. Pub. Regulation Comm’n*, 392 F.3d 1204, 1207 (10<sup>th</sup> Cir. 2004) (citing *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4<sup>th</sup> Cir. 2004) (“interconnection agreements are a ‘creation of federal law’ and are ‘the vehicles chosen by Congress to implement the duties imposed in § 251.’”); see also, *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16- JMH at 12, n.3 (E.D. Ky. Apr. 22, 2005) (“the Court is likely to find that due to the fact that the interconnection agreements are not privately negotiated contracts, the Mobile-Sierra doctrine is not applicable.”) (citations omitted)).

In light of this precedent, the Commission finds that the Joint Petitioners' reliance on limitation of liability provisions that allegedly appear in certain commercial contracts is misplaced.

Similarly, the Commission finds that the Joint Petitioners' reliance on off-tariff contracts they have negotiated with some of their own retail customers is misplaced, because the Joint Petitioners are in a much different situation when they negotiate these contracts than BellSouth is in when it arbitrates provisions of an interconnection agreement. When the Joint Petitioners negotiate contracts with their retail customers, they can make the business decision to "walk away from the negotiating table" rather than agree to alter their standard limitation of liability language with an end user. They can also seek to recover any increased liabilities that may be associated with deviating from their standard language by charging negotiated rather than TELRIC rates.

In sharp contrast, BellSouth does not have these options when it negotiates an interconnection agreement with CLECs under the 1996 Act. BellSouth cannot refuse to enter into an interconnection agreement with the Joint Petitioners and must charge TELRIC rates for interconnection and UNEs that it is required to provide under such agreements. Further, whenever Joint Petitioners do make the business decision to deviate from their standard limitation of liability language after assessing the risk of a particular customer, the Joint Petitioners do not have to consider the prospect that every other potential customer in South Carolina could be entitled to those same terms and conditions as a matter of law.

For the foregoing reasons, the Commission adopts BellSouth's proposed language and orders the Parties to include that language in their agreement.

***Issue 5: BellSouth Issue Statement: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? Joint Petitioners' Issue Statement: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited? (GT&C, Section 10.4.2)***

The Commission finds that if a CLEC end user brings a claim against BellSouth for a matter related to the interconnection agreement, BellSouth should be in the same position that it would be in if the CLEC end user was a BellSouth end user. Thus, to the extent the Joint Petitioners decide to not limit their liability in accordance with industry standards, the Joint Petitioners should indemnify or reimburse BellSouth for any loss BellSouth sustains as a result of that decision or action. This is consistent with decisions rendered by at least five other state Commissions that have considered this same issue in companion arbitration dockets<sup>36</sup> and of at least two state Commissions that considered this issue in a different context.<sup>37</sup>

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<sup>36</sup> See *Florida Order* at 10 (“... CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk.”); *Mississippi Order* at 15 (same); *Georgia Order* at 5 (adopting Staff recommendation to “order that should Joint Petitioners not limit their liability in accordance with BellSouth tariffs that the Joint Petitioners should indemnify BellSouth for any loss BellSouth sustains because of that decision” and noting that “[i]t would not be fair for BellSouth to be put at an increased risk as a result of a CLEC’s business decision to offer an end user a more favorable limitation of liability provision in their service agreement”); *Kentucky Order* at 4 (“Joint Petitioners should use the industry standard limitation of liability in their relationship with their end-users to limit the exposure to which BellSouth would be subject in the absence of such industry standard language.”); *North Carolina Order* at 13 (“There is no evidence the proposed language has caused a dispute or adversely affected a third party or that the [CLECs] have in fact relaxed their limitation of liability language. . . . The Commission concludes that if a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from this decision.”).

<sup>37</sup> *In re: Petition of AT&T Communications of the Midwest, Inc.*, Minn. P.U.C., Docket No. P-442, 421/IC-03-759, 2003 WL 2287903 at \*18 (Nov. 18, 2003) (“*Minnesota Arbitration Order*”); *In re: AT&T*

The language the Commission adopts is in the Joint Petitioners' current interconnection agreements, and it has never been the subject of any dispute.<sup>38</sup> Further, the Joint Petitioners currently have limitation of liability language in their tariffs and contracts; they believe that their language is the maximum limit allowed by law; they have no plans to remove this language; their tariffs are in effect today; and they intend to enforce tariff provisions limiting their liability.<sup>39</sup> In fact, as conceded by NuVox, having unlimited liability is not a prudent business move.<sup>40</sup>

The Joint Petitioners correctly note that the Parties cannot limit the rights of third Parties via the Parties' interconnection agreement, but that has no application here. The language the Commission adopts does not limit the rights of any third party or dictate the terms by which the Joint Petitioners can offer service to their customers. Instead, like the language that has governed the Parties' relationship for the last several years, the language adopted by the Commission imposes obligations upon the Joint Petitioners (not their customers) in the event the Joint Petitioners make a business decision to not limit their liability within industry standards.

Additionally, the Joint Petitioners' end users are not purchasing services out of BellSouth's tariffs and are not under contract with BellSouth.<sup>41</sup> Accordingly, if the Joint Petitioners agree to pay a customer \$1,000 if they fail to provision a loop within a

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*Communications of New York, Inc.*, N.Y. P.S.C., Case 01-C-0095, 2001 WL 1572958 at 12 (finding that AT&T should implement tariff and contract provisions to limit Verizon's potential liability to AT&T customers).

<sup>38</sup> SC Tr. at 417; FL Tr. at 204-205.

<sup>39</sup> SC Tr. at 417-418; FL Tr. at 203; Russell Depo. at 87; Falvey Depo. at 61; Johnson Depo. at 81-82; NuVox SC Tariff at § 2.1.4; KMC SC Tariff at § 2.1.4; 2.1.6; Xspedius SC Tariff at § 2.1.4; 2.1.6, collectively attached as KKB-1 to Blake's SC Direct Testimony.

<sup>40</sup> See Russell Depo. at 82.

<sup>41</sup> FL Tr. at 205.

specific time period, and if BellSouth misses the due date for the loop, the Joint Petitioners could seek to recover the \$1,000 they agreed to pay their customer from BellSouth through the indemnification language. If that customer were a BellSouth customer, however, BellSouth's total exposure would be for bill credits. The Commission finds that BellSouth should not be exposed to greater liability than otherwise contemplated simply because the end user is a CLEC end user rather than a BellSouth end user.

For the foregoing reasons, the Commission adopts BellSouth's proposed language and orders the Parties to include that language in their agreement.

***Issue 6: BellSouth Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? Joint Petitioners' Issue Statement: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages? (GT&C Section 10.4.4)***

The Parties agree that they will not be liable to each other for indirect, consequential or incidental damages.<sup>42</sup> The Commission finds that the Joint Petitioners' language is unnecessary and defeats limitation of liability protections provided by language adopted by the Commission.

NuVox's witness testified that the purpose of the Joint Petitioners' proposed language is to make certain that end user damages that arise directly and proximately from BellSouth's negligence, gross negligence, or willful misconduct cannot be termed in

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<sup>42</sup> FL Tr. at 207.

this agreement as incidental or consequential.<sup>43</sup> The language proposed by the Joint Petitioners, however, does not address this concern. Instead, it provides that no Party would be responsible for indirect, incidental, or consequential damages “provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party’s performance of services hereunder . . . .”<sup>44</sup> Damages that are direct and foreseeable, however, cannot also be indirect, incidental, or consequential. The Commission, therefore, fails to see why this language is necessary.

Furthermore, notwithstanding the Parties’ agreement that there should be some limitation of liability between them, the Joint Petitioners’ language defeats this limitation by excluding the limitation of liability provision for damages “incurred by such other Party vis-à-vis its End Users.” Thus, as long as the Joint Petitioners brought a claim for damages incurred by the Joint Petitioners “vis-à-vis its End Users”, BellSouth’s liability to the Joint Petitioners could be unlimited. The Commission is unwilling to allow the language proposed by the Joint Petitioners to circumvent already agreed upon concepts. This is consistent with decisions rendered by at least four other state Commissions that have considered this same issue in companion arbitration dockets.<sup>45</sup>

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<sup>43</sup> FL Tr. at 208; Russell Depo. at 102, 104-105.

<sup>44</sup> See Joint Petitioner Exhibit “A” at GTC § 10.4.4.

<sup>45</sup> See *Florida Order* at 11 (“. . . we shall not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential shall be made, consistent with applicable law, if and when a specific damage claim is presented to this Commission, the FCC or a court of law.”); *Mississippi Order* at 17 (same); *Kentucky*

For the foregoing reasons, the Commission adopts BellSouth's proposed language and orders the Parties to include that language in their agreement.

***Issue 7: What should the indemnification obligations of the parties be under this Agreement? (GT&C, Section 10.5)***

In most cases, the Joint Petitioners will be the receiving Party and BellSouth will be the providing Party under the interconnection agreement.<sup>46</sup> Thus, in most cases, the Joint Petitioner's language requires BellSouth to indemnify the Joint Petitioners for "(1) [BellSouth's] failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with the Agreement to the extent caused by [BellSouth's] negligence, gross negligence or willful misconduct."<sup>47</sup> Under the Joint Petitioners' proposed language, however, the Joint Petitioners would only indemnify BellSouth "against any claim for libel, slander or invasion of privacy arising from the content of [the Joint Petitioners'] own communications."<sup>48</sup> Thus, BellSouth would have virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners would have essentially no indemnification obligations to BellSouth. Moreover, under the Joint Petitioners' language, if BellSouth were sued by a third party solely as the result of the negligence of a Joint Petitioner, BellSouth would have no indemnification rights against

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*Order* at 5 ("... [t]he Commission finds that the language proposed by the Joint Petitioners is not necessary and should not be placed in the interconnection agreement. Interested persons who may be affected by the differing definitions proposed by the parties appear to have redress in courts of general jurisdiction."); *North Carolina Order* at 14-15 ("The Commission approves BellSouth's proposed version of Section 10.4.4 in the General Terms and Conditions of the Agreement. The Commission agrees that the language proposed by the Joint Petitioners is unnecessary and potentially confusing. The end users are not parties to this Agreement or arbitration and therefore their rights should be defined not by this Agreement, but rather pursuant to state contract law.").

<sup>46</sup> FL Tr. at 199.

<sup>47</sup> See Joint Petitioner Exhibit "A" GT&C at § 10.5.

<sup>48</sup> *Id.*

the Joint Petitioners.<sup>49</sup> We think this is inequitable. As a provider of services to the Joint Petitioners, BellSouth should be indemnified under such circumstances by the Joint Petitioners for claims that their end users bring against BellSouth. However, we also believe that the Joint Petitioners should be indemnified by BellSouth for claims that their end users bring against the Joint Petitioners, if BellSouth was negligent. In fact, we believe that each party should indemnify the other not only in a case of negligence, but also in cases of gross negligence, or willful misconduct.

Accordingly, we adopt the following language for Section 10.5 of the General Terms and Conditions:

Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates, and its parent company, shall be indemnified, defended, and held harmless by the party receiving services hereunder against any claim, loss or damage to the extent arising from (1) the receiving Party's failure to abide by Applicable Law, (2) injuries or damages arising out of or in connection with this Agreement suffered by the End User to the extent caused by the receiving Party's negligence, gross negligence or willful misconduct, or (3) any claim for libel, slander, or invasion of privacy arising from the content of the receiving Party's own communications. The Party receiving services hereunder, its Affiliates, and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, (2) injuries or damages arising out of or in connection with this Agreement suffered by the End User to the extent caused by the providing Party's negligence, gross negligence or willful misconduct, or (3) any claim for libel, slander or invasion of privacy arising from the content of the providing Party's own communications.

We believe that the Indemnification clause stated above gives equal treatment to both the Joint Petitioners and BellSouth, should negligence, gross negligence, or willful misconduct occur in the presentation of service to the End User. However, we would note

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<sup>49</sup> FL Tr. at 202.

that the limitation on liability for negligence previously approved in this Order as to Issue 4 continues to apply under indemnification circumstances.

***Issue 9: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement? (GT&C Section 13.1)***

This issue is about who decides, in the first instance, disputes about the interconnection agreement that are within the expertise or jurisdiction of the Commission or the FCC. BellSouth believes the Commission or the FCC should decide, in the first instance, disputes about the interconnection agreement that are within their expertise or jurisdiction, subject to review by the Courts.<sup>50</sup> The Joint Petitioners, on the other hand, want to bring all such disputes to a court of law in the first instance, even if the Commission has jurisdiction and/or expertise to resolve the dispute. Moreover, under the Joint Petitioners' proposed language, a dispute about an interconnection agreement this Commission arbitrates and approves could be decided by a court in a state other than South Carolina.<sup>51</sup> For the following reasons, the Commission adopts BellSouth's proposed language.

Interconnection agreements achieved through either voluntary negotiations or through compulsory arbitration are established pursuant to Section 252 of the 1996 Act. Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. The Commission, therefore, is in the best position to resolve disputes that are within its expertise or jurisdiction and that

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<sup>50</sup> FL Tr. at 886; BellSouth Exhibit "A", GT&C at § 13.1.

<sup>51</sup> SC Tr. at 439-40.

relate to the interpretation or enforcement of an agreement that it approves pursuant to the 1996 Act.<sup>52</sup>

The U.S. Court of Appeals for the Eleventh Circuit used this same rationale to find that the 1996 Act authorizes state commissions to interpret interconnection agreements.<sup>53</sup> Similarly, the FCC has held that, “due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements.”<sup>54</sup> The Kentucky Commission also has ruled that “disputes arising under interconnection agreements must be brought before the Commission before they proceed to a court of general jurisdiction.”<sup>55</sup>

Contrary to these well-reasoned decisions, the Joint Petitioners’ proposed language would allow them to ask a court in another state to resolve disputes about South Carolina interconnection agreements that this Commission arbitrates and that this Commission approves.<sup>56</sup> This is not an appropriate result. Both federal and state law entrust this Commission to decide such issues in the first instance, and this Commission is willing and able to carry out its responsibility to do so. Disputes that address an interconnection agreement approved by this Commission, and that are within the

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<sup>52</sup> FL Tr. at 814; SC Tr. at 236.

<sup>53</sup> See *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11<sup>th</sup> Cir. 2003). As stated by the court: “the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce *in the first instance* and to subject their determination to challenges in the federal courts.” *Id.* (emphasis added).

<sup>54</sup> *Id.* (quoting *In re: Starpower*, 15 FCC Rcd at 11280 (2000)).

<sup>55</sup> *Kentucky Order* at 7.

<sup>56</sup> SC Tr. at 438.

jurisdiction and/or expertise of this Commission, should be presented to the Commission for resolution in the first instance.

Adopting BellSouth's language is appropriate and does not result in this Commission changing or limiting the jurisdiction of any court. Rather, BellSouth's language identifies the specific forums, all of which may have jurisdiction, that the Parties will use to address specific interconnection agreement disputes in the first instance. Any such determination, of course, remains subject to review by the courts.

For the foregoing reasons, the Commission adopts BellSouth's proposed language and orders the Parties to include that language in their agreement.

***Issue 12: Should the Agreement explicitly state that all existing state and federal law, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties? (GT&C, Section 32.2)***

This issue centers on how the Parties should handle disputes when one Party asserts that an obligation, right, or other requirement relating to telecommunications law is applicable even though that obligation, right, or requirements is not expressly memorialized in the interconnection agreement. BellSouth is concerned that after the Parties and this Commission have spent a great deal of time negotiating and arbitrating an interconnection agreement that implements the law that was in effect at the time of the agreement's execution, the Joint Petitioners will: review a telecommunications rule or order that was in effect at the time the agreement was executed; interpret that rule or order in a manner that BellSouth could not have anticipated; claim that their after-the-fact interpretation creates a contractual obligation that is not specified in the interconnection

agreement (even though the Joint Petitioners did not raise the issue during two years of negotiations); and seek to enforce that purported obligation against BellSouth.

The Joint Petitioners concede that “we’ve done that from time to time,”<sup>57</sup> and the North Carolina EEL audit proceeding was one such time.<sup>58</sup> The interconnection agreement at issue in that case was executed after the FCC issued its *Supplemental Order on Clarification* (“SOC”) that, in part, addressed EEL audits. Although the SOC made it clear that parties could agree to different EEL audit provisions, and although the interconnection agreement contained EEL audit provisions that were different than those set forth in the SOC, NewSouth (one of the Joint Petitioners here) used this same “Applicable Law” argument to claim that all of the EEL audit provisions in the SOC were automatically incorporated into the interconnection agreement. The North Carolina Commission rejected NewSouth’s argument:

NewSouth has also argued that the general principle that agreements are interpreted in light of the body of law existing at the time agreements are executed is part of Georgia law. NewSouth applies this principle by arguing that the entire SOC, as part of the existing law at the time the Agreement was executed, must be read into the Agreement, and that the Parties would have had to have included an express statement excluding the SOC from the Agreement if they wanted to be relieved from the requirements and restrictions of the SOC. The Commission does not agree.<sup>59</sup>

The North Carolina Commission explained that “having entered into the Agreement, the Parties’ dealings are now governed by the specific terms of the Agreement and not the

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<sup>57</sup> GA Tr. at 435.

<sup>58</sup> See *In re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub 7, *Order Granting Motion for Summary Disposition and Allowing Audit*, (Aug. 24, 2004).

<sup>59</sup> *Id.* at 8.

general provisions of Section 251 and 252 of the 1996 Act or FCC rulings and orders issued pursuant to those stated sections.”<sup>60</sup>

The Commission finds that the North Carolina Commission’s reasoning is persuasive. An interconnection agreement should provide certainty as to the Parties’ respective obligations. In addition to being inconsistent with these rulings, the Commission finds that the Joint Petitioners’ position on this issue is unworkable and contrary to the purpose of negotiating interconnection agreements in the first place. The Joint Petitioners, for instance, take the position that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise.<sup>61</sup> Taken to its logical extreme, this means that interconnection agreements would consist only of a list of all instances where the Parties agreed to something other than Applicable Law. NuVox’s own witness, however, conceded that he could not list all of the instances in which the Parties agreed to something other than Applicable Law.<sup>62</sup> Moreover, the Commission finds that one important purpose of an interconnection agreement is to go beyond generically agreeing to comply with the law by memorializing the Parties’ agreement as to how they will go about doing so on a practical, operational, and day-to-day basis. Consequently, the Joint Petitioners’ language is unworkable and defeats the entire purpose of negotiation and arbitration pursuant to Section 252 of the 1996 Act (as well as the efforts of the Parties

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<sup>60</sup> *Id.* at 6.

<sup>61</sup> FL Tr. at 220; Russell Depo. at 142; 145.

<sup>62</sup> *Id.*

since June 2003).<sup>63</sup> On the other hand, we hold that it is reasonable to recognize that Applicable Law otherwise applies to the agreement.

For the foregoing reasons, the Commission adopts the following language:

Nothing in this Agreement shall be construed to limit a Party's rights or exempt a party from obligations under Applicable Law, except in such cases where the Parties have explicitly or impliedly agreed to an exception to a requirement of Applicable law or to abide by provisions which conflict with and thereby displace corresponding requirements of Applicable Law. Silence shall not be construed to be such an exemption to or displacement of any aspect of Applicable Law. Notwithstanding the foregoing, however, no Party may assert new rights or privileges not explicitly stated in this Agreement based on existing rules, regulations, rulings or other law that were not considered by the Parties at the time of the execution of this Agreement, unless consented to by the other Party to the Agreement.

***Issue 86B: (B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement? (Attachment 6, Sections 2.5.5.2 and 2.5.5.3)***

Customer service record ("CSR") information contains Customer Proprietary Network Information ("CPNI"), and BellSouth and the Joint Petitioners have an obligation under federal law to protect the unauthorized disclosure of CPNI.<sup>64</sup> Given these obligations, the Parties have agreed to refrain from accessing CSR information without an appropriate Letter of Authorization ("LOA") from a customer and to "access CSR information only in strict compliance with applicable laws."<sup>65</sup> The Parties also have agreed that upon request by one Party, the other Party "shall use best efforts" to provide the requesting Party an appropriate LOA within seven (7) business days.<sup>66</sup> Under the

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<sup>63</sup> The Parties have been negotiating the instant agreement since at least June 2003. FL Tr. at 218.

<sup>64</sup> FL Tr. at 629.

<sup>65</sup> FL Tr. at 629; BellSouth FL Hearing Ex. 23 [Att. 6, § 2.5.5].

<sup>66</sup> FL Tr. at 630; Att. 6, § 2.5.5.1.

BellSouth proposal, that Company could refuse to accept new orders, suspend any pending orders, and access to ordering and provisioning systems, if the difficulty is not resolved within a specific timeframe.<sup>67</sup> Such activity disrupts Joint Petitioners' business operations.

The Joint Petitioners have proposed that the offended party first notify the other party of the alleged unauthorized access and that the parties attempt to resolve the matter themselves.<sup>68</sup> If unsuccessful, the Joint Petitioners ask that the Agreement's standard dispute resolution provisions apply.<sup>69</sup>

We find that the Joint Petitioners' proposal affords sufficient protection for all. Accordingly, we find that disputes over unauthorized access to CSR information should be resolved by resorting to the standard dispute resolution provisions in the General Terms and Conditions section of the Agreement. We agree with the Joint Petitioners' position on this issue and adopt Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6. This language is contained at pp. 28 and 29 of the Proposed Order of the Joint Petitioners in this Docket, and reads as follows:

Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7<sup>th</sup>) business day after such request has been made, the requesting Party will send written notice by email to all notice recipients designated in the General Terms and Conditions to the other Party specifying the alleged noncompliance.

Disputes over Alleged Noncompliance. In its written notice to the other Party (with an additional copy to be sent by email to all notice recipients

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<sup>67</sup> Ferguson Test. at 3.

<sup>68</sup> Joint Petitioner testimony at 77; Joint Petitioner Rebuttal testimony at 62.

<sup>69</sup> Joint Petitioner testimony at 76; Joint Petitioner Rebuttal testimony at 62.

designated in the General Terms and Conditions), the alleging Party may state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5<sup>th</sup>) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice (with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions) to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10<sup>th</sup>) calendar day following the date of the initial notice. BellSouth will not invoke any remedy specified in this Section unless its allegations pertain to systemic rather than isolated instances of unauthorized access to CSR information and unless it first provides notice to the Commission of its intent to impose such remedies. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party shall not invoke any remedy specified in this paragraph and shall instead proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

***Issue 97: When should payment of charges for service be due? (Attachment 7, Section 1.4)***

BellSouth proposes that the bills it sends the Joint Petitioners should be due by the next bill issuance date. Joint Petitioners propose that section 1.4 of Attachment 7 of the Agreement provide for payment of charges for services be due 30 calendar days from receipt or posting of a complete and fully readable bill.<sup>70</sup> The evidence of record reflects that the Joint Petitioners, like all CLECs, have a set bill date for every bill they receive from BellSouth.<sup>71</sup> In contrast, the Commission finds that the Joint Petitioners' proposal

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<sup>70</sup> Joint Petitioner testimony at 81-82.

<sup>71</sup> SC Tr. at 294; FL Tr. at 901.

would result in an ever extending, revolving payment due date that would be difficult to administer. Moreover, the Joint Petitioners' proposal would require modifications to BellSouth's billing systems,<sup>72</sup> but the Joint Petitioners are unwilling to pay for those modifications.<sup>73</sup>

Adoption of BellSouth's proposed language on this issue would be consistent with the decisions of at least two other state Commissions in companion arbitration proceedings.<sup>74</sup> In concluding that payment of charges shall be made on or before the next bill (payment due) date, the Florida Commission specifically found that

BellSouth's current bill rendering practices are reasonable. As noted in Hearing Exhibit 2 and 19, BellSouth's SQM performance results indicate that, on average, BellSouth is delivering bills to its wholesale customers at "parity" with its own retail customers. We find BellSouth shall not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at its own expense, in order to exceed "parity" performance.<sup>75</sup>

This Commission finds this reasoning persuasive, however, we think that it is reasonable to modify the language to ensure that the Joint Petitioners receive their bills so that they will have sufficient time to review them before having to remit payment. Accordingly, we adopt the following language and order that said language be used in the parties' interconnection agreements at Section 1.4 of Attachment 7:

Payment for services should be due on or before the next bill date (Payment Due Date) in immediately available funds. However, BellSouth should submit bills for mailing such that, under normal circumstances, bill delivery may be expected at least fifteen days prior to Payment Due Date.

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<sup>72</sup> FL Tr. at 902.

<sup>73</sup> FL Tr. at 416; SC Tr. at 295.

<sup>74</sup> *Florida Order* at 64; *Mississippi Order* at 35.

<sup>75</sup> *Florida Order* at 63-64.

***Issue 100: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination? (Attachment 7, Section 1.7.2)***

BellSouth has the right to suspend or terminate service for nonpayment.<sup>76</sup> Further, BellSouth acknowledges that it will not commence any suspension or disconnection activity involving amounts that are subject to a billing dispute.<sup>77</sup> This issue, therefore, arises only when a Joint Petitioner does not pay *undisputed* amounts that are past due.<sup>78</sup>

Given these circumstances, the Commission finds that if a Joint Petitioner receives a notice of suspension or termination from BellSouth because the Joint Petitioner has not timely paid amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action. In other words, if other undisputed amounts become past due between the time BellSouth issues the notice of suspension or termination and the date of the pending suspension or termination action, a Joint Petitioner should have to pay those undisputed past-due amounts as well as the undisputed past-due amounts that were identified in the notice. This is consistent with decisions rendered by at least two other state Commissions that have considered this same issue in companion arbitration dockets.<sup>79</sup>

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<sup>76</sup> FL Tr. at 261.

<sup>77</sup> *Id.*

<sup>78</sup> See BellSouth Exhibit "A", Att. 7, § 1.7.2.

<sup>79</sup> See *Florida Order* at 65 ("we find it reasonable to require that any other past due undisputed amounts be paid as well be the due date on the treatment notice."); *Mississippi Order* at 38 (concluding that "a CLEC should be required to pay past due undisputed amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination.").

BellSouth's proposed language provides for written notice and a reasonable opportunity for Joint Petitioners to pay past due undisputed amounts prior to service discontinuance. Additionally, as noted earlier, the Joint Petitioners know when they receive bills, they know when the bills are due, and they admit that the amount of such bills can be predicted with a reasonable degree of accuracy.<sup>80</sup> If the Joint Petitioners are not clear as what undisputed amounts are past due, they can contact BellSouth with any questions they may have regarding amounts owed, and BellSouth has committed to cooperate to promptly answer any billing related questions.<sup>81</sup>

The Joint Petitioners' expressed concern that they may have to guess as to what additional past due amounts must be paid in order to avoid suspension or termination.<sup>82</sup> BellSouth, however, will make aging reports available to CLECs that fail to timely pay undisputed amounts owed, and these reports provide, by billing account number: current charges; past due charges; disputed charges; total past due amount owed less current charges and disputed charges; and the ability to determine amounts that will become past due during the notice period.<sup>83</sup> Additionally, BellSouth's proposed language states that, upon request, BellSouth will advise the Joint Petitioners of the additional undisputed amounts that have become past due since the issuance of the original notice of suspension or termination.<sup>84</sup> This proposal appropriately addresses the "guesswork" concerns the Joint Petitioners have raised.

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<sup>80</sup> See discussion of Issue 97, *supra*.

<sup>81</sup> FL Tr. at 902.

<sup>82</sup> FL Tr. at 72.

<sup>83</sup> BellSouth's Response to FL Staff Interrogatory No. 117 (Attached as Exhibit KKB-8 to Kathy Blake's SC Rebuttal Testimony).

<sup>84</sup> See BellSouth Exhibit "A", Att.7, § 1.7.2; BellSouth Response to FL Staff Interrogatory No. 117.

For the foregoing reasons, the Commission adopts BellSouth's proposed language as modified and orders the Parties to include that language in their agreement. The language is as follows:

If a CLEC receives a notice of suspension or termination from BellSouth as a result of CLEC's failure to pay timely, CLEC should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action.

***Issue 101: How many months of billing should be used to determine the maximum amount of the deposit? (Attachment 7, Section 1.8.3)***

A deposit reduces BellSouth's potential losses if a Joint Petitioner (or any CLEC that adopts a Joint Petitioner's interconnection agreement) ceases to pay its bills. The Parties agree that BellSouth has a right to a deposit, or to demand an additional deposit, if any Joint Petitioner fails to meet the specific and objective deposit criteria set forth in Attachment 7, Section 1.8.5.<sup>85</sup> In this case, BellSouth's position is that the average of two (2) months of actual billing for existing customers or estimated billing for new customers is the appropriate amount for a deposit. The Joint Petitioners state that the maximum deposit should not exceed one month's billing for services billed in advance and two months' billing for services billed in arrears. Alternatively, the maximum deposit should not exceed two month's estimated billing for new CLECs or one and one-half months' actual billing for existing CLECs.

The Joint Petitioners argue that being required to post excessive deposits places

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<sup>85</sup> The agreed-upon deposit criteria terms takes into account a CLEC's payment history, and other objective financial measurements, such as liquidity status (based upon a review of EBITDA) and bond rating (if any).

them at a competitive disadvantage.<sup>86</sup> The Joint Petitioners assert that deposits, by their nature, tie up capital, thus constraining their ability to increase funding dedicated to facilities deployment or service innovations.<sup>87</sup> The Joint Petitioners also argue that they have stable and longstanding business relationships with BellSouth, thus considerably decreasing BellSouth's risk.<sup>88</sup> Further, the Joint Petitioners point out that BellSouth, throughout the region, has agreed to a one-month maximum deposit provision with ITC^DeltaCom for services paid in advance and a maximum of two months for service paid in arrears.<sup>89</sup> As a matter of parity and nondiscrimination, the Joint Petitioners argue that they are entitled to the same treatment, unless BellSouth can demonstrate good cause to require different terms. See 47 U.S.C. Section 251(c)(2); 47 C.F.R. Section 51.313; *Local Competition First Report and Order*, 11 FCC Rcd. at 15614, Paragraph 224.

We agree with the Joint Petitioners. Further, we do not believe that BellSouth has demonstrated good cause to require different terms. We conclude that BellSouth's financial risk is properly addressed by the maximum deposit provision already agreed to with ITC^DeltaCom. Thus, Section 1.8.3 of Attachment 7 should provide for a maximum deposit of up to one month's billing for service paid in advance, and up to two months' billing for services paid in arrears. The required language is as follows:

The amount of the security shall not exceed one (1) month's billing for services billed in advance and two (2) month's billing for services billed in arrears (based on average monthly billings for the most recent six (6) month period; based on good faith estimates for new CLECs.) Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

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<sup>86</sup> Joint Petitioner Brief at 61.

<sup>87</sup> Joint Petitioner Testimony at 89, lines 14-15.

<sup>88</sup> *Id.* at 89, lines 17-19.

<sup>89</sup> Joint Petitioner Brief, Attachment 22.

***Issue 102: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC? (Attachment 7, Section 1.8.3.1)***

We believe that BellSouth is within its rights to protect itself against uncollectible debts by collecting deposits from the Joint Petitioners on a non-discriminatory basis. Doing so protects the interests of BellSouth's shareholders, employees, and other customers. Further, BellSouth states that it is willing to agree that when it makes a deposit demand (or a request for additional deposit) BellSouth will reduce its deposit demand by the undisputed amount past due (if any) owed by BellSouth to any Joint Petitioners for payments pursuant to Attachment 3 of the Interconnection Agreement.<sup>90</sup> Under this proposal, upon BellSouth's payment of such amount, a Joint Petitioner would be required to immediately increase the deposit in an amount equal to such payment(s).<sup>91</sup>

The Commission finds that BellSouth's proposal is reasonable, and it is consistent with the rulings of at least five other state Commissions that have considered this same issue in companion arbitration dockets.<sup>92</sup> Under this proposal, the Joint Petitioners immediately receive the benefit of undisputed past-due amounts that BellSouth owes them, and they retain all the remedies that are available to them with regard to disputed amounts. These remedies may included assessing late payment charges, suspending

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<sup>90</sup> FL Tr. at 914-915.

<sup>91</sup> *Id.*

<sup>92</sup> *Florida Order* at 70 ("We find that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate."); *Mississippi Order* at 43 ("The amount of the deposit BellSouth requires from CLEC should not be reduced by past due amounts owed by BellSouth to CLEC."); *Georgia Order* at 35-36 (accepting Staff's recommended "adoption of BellSouth's proposal . . ."); *Kentucky Order* at 19 ("Commission finds that the issue of the amount owed by a CLEC to BellSouth and the amount owed to a CLEC by BellSouth are distinct issues and declines to accept the Joint Petitioners' position."); *North Carolina Order* at 88 ("Commission concludes that [CLECs] should not be allowed to offset security deposits by amounts owed to them by another carrier.").

service, terminating service, or initiating appropriate proceedings to resolve the dispute and collect any amounts that are, in fact, due.<sup>93</sup> The Commission, however, is unwilling to require BellSouth to reduce the amount of a deposit a Joint Petitioner is obligated to pay by *disputed* amounts that BellSouth allegedly owes.

For the foregoing reasons, the Commission adopts BellSouth's proposed language and orders the Parties to include that language in their agreement.

***Issue 103: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days? (Attachment 7, Section 1.8.6)***

It is undisputed that BellSouth has a contractual right to a deposit.<sup>94</sup> It is undisputed that the Parties have agreed to objective and specific criteria that govern BellSouth's right to demand a deposit.<sup>95</sup> Further, it is undisputed that if a Joint Petitioner satisfies the deposit criteria, then BellSouth will refund the deposit amount within 30 calendar days, plus accrued interest.<sup>96</sup> The question presented by this issue, therefore, is what happens if a Joint Petitioner neither pays nor disputes a deposit requested by BellSouth.

Termination for non-payment of a deposit is not a novel concept. It is expressly authorized by this Commission<sup>97</sup> and the Florida Commission,<sup>98</sup> and the end user tariffs of the Joint Petitioners expressly authorize termination for non-payment of "any amounts

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<sup>93</sup> See FL Tr. at 913-914.

<sup>94</sup> See Att. 7, §1.8.

<sup>95</sup> See Att. 7, § 1.8.5.

<sup>96</sup> See Att. 7, § 1.8.10.

<sup>97</sup> See S.C. Code Regs. 103-625.i.

<sup>98</sup> FL Tr. at 256-257.

owed to the Company.”<sup>99</sup> Additionally, thirty calendar days is a reasonable time period for a Joint Petitioner to either dispute or satisfy a request for a deposit. Accordingly, the Commission finds that to protect its financial interests, BellSouth may terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within 30 calendar days. This is consistent with decisions rendered by at least three other state Commissions that have considered this same issue in companion arbitration dockets.<sup>100</sup>

For the foregoing reasons, the Commission adopts BellSouth’s proposed language and orders the Parties to include that language in their agreement.

### **CONCLUSION**

The Parties are ordered to implement the Commission’s resolution of the issues addressed in this Order by including in their respective Interconnection Agreements language that complies with the rulings and framework set forth in this Order. The Parties shall file these Agreements with the Commission within sixty (60) days after receipt of this Order.

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<sup>99</sup> NuVox SC Tariff, § 2.7.3(A); Xspedius SC Tariff § 2.5.5(A); KMC SC Tariff § 2.5.5(A).

<sup>100</sup> *Florida Order* at 73; *Mississippi Order* at 90; *North Carolina Order* at 90.

This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

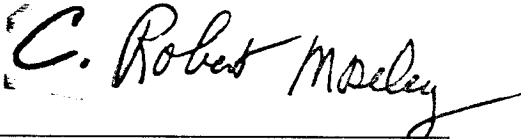
BY ORDER OF THE COMMISSION:



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G. O'Neal Hamilton, Chairman

ATTEST:



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C. Robert Moseley, Vice Chairman

(SEAL)